

Cochrane (Migration) [2017] AATA 2507 (29 September 2017)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Gavin Cochrane

CASE NUMBER: 1616435

DIBP REFERENCE(S): Clf2013/170727

MEMBER: Moira Brophy

DATE: 29 September 2017

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.211 of Schedule 2 to the Regulations.
- cl.801.221 of Schedule 2 to the Regulations.
- r.2.03A.

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September 2017 at 11:06am

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Statement made on 29

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – Genuine de facto relationship – Intertwined financial affairs – Shared household responsibilities – Relationship represented to the wider community – Emotional support

LEGISLATION

Migration Act 1958, ss 5CB, 65

Migration Regulations 1994, r 1.09A, r 2.03A, Schedule 2, cl 802.211, cl 802.221

The Tribunal directs that information that would identify the applicant (including information about family, friends or associates) not be published (under s.378 of the *Migration Act 1958*). This means that if this decision is published, names and other identifying material must be removed from or modified in the published version of the decision.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 14 September 2016 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 23 July 2013 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 as he was not satisfied the visa applicant was a spouse as defined under the Act.
4. The applicant, Mr Gavin Cochrane appeared before the Tribunal on 4 August 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Mr Adam Taylor.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

Background

6. The applicant, Mr Gavin Cochrane was born on 21 May 1982 in Scotland and he is a citizen of the United Kingdom (UK). He was previously in a relationship from 2004 to July 2011 with Gerard Harkin. His mother resides in the UK.
7. The applicant's sponsor, Mr Adam Taylor was born in Australia on 6 November 1990. He was previously in a relationship with Michael Cleaver in the period from 2 November 2009 to March 2011. His parents, three brothers and three sisters reside in Australia.
8. The parties stated they met at the Odeon Cinema in Orange on 17 March 2012. Their de facto relationship commenced on 27 March 2012 and they have resided together at various addresses since that time. They registered their relationship with NSW Births Deaths and Marriages on 2 August 2013.
9. In the Record of Decision, a copy of which the applicant provided to the Tribunal, the delegate stated that the applicant had failed to provide evidence of joint liabilities or the sharing of day to day expenses, no evidence of the maintenance of a household consistent with a genuine and ongoing de facto relationship, no evidence as to the nature and progression of the relationship and limited information as to the parties commitment to the relationship. He stated that at the time of decision he had no information before him which demonstrated that the parties continued to be in a de facto relationship.
10. Prior to the hearing the applicant provided documents to the Tribunal including but not limited to the following;

- Statements of bank accounts (BOQ and ING) in name of visa applicant (July 2015 to February 2016).
- Statements of bank accounts (BOQ) in name of sponsor (July 2015 to March 2016),
- Flight itineraries and accommodation details for joint travel to Melbourne October/November 2016.
- Statements attesting to the relationship between the parties.

11. Following the hearing the applicant provided the following:

- Statements of bank accounts (Suncorp) in name of the sponsor (March 2016 to April 2017).
- Statements of bank accounts (Westpac) in name of sponsor (February 2016 to August 2017).
- Statements of bank accounts (ING Direct) in name of sponsor (September 2015 to March 2016).
- Statements of bank accounts (ING Direct) in name of applicant (September 2015 to June 2016).
- Statements of bank accounts (St George) in name of applicant (April 2017 to August 2017).

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in the present case is whether Mr Gavin Cochrane was in a genuine and continuing spousal relationship with Mr Adam Taylor at the time of application and continues to be in a genuine spousal relationship at the time of this decision.
13. In making its findings, the Tribunal has considered the documents contained in the Department and Tribunal files as well as the oral evidence provided at the hearing by the applicant and her sponsor.
14. The parties gave consistent and coherent oral evidence about the circumstances in which they met, the development of their relationship and their current living arrangements. While the Tribunal was concerned at the lack of specificity particularly in relation to their financial aspects the Tribunal does not regard their lack of credibility in that regard as being indicative of their not being in a genuine and continuing relationship. To the contrary they presented as two troubled souls who were battling on many fronts but were sustained by their relationship and support of each other. The Tribunal found them to be credible as regards their commitment to their relationship.
15. The Tribunal accepts the parties' oral evidence which was corroborative of their evidence at the time of application that they met in Orange on 17 March 2012. Their de facto relationship commenced on 27 March 2012 when they moved in together. They have resided together at various addresses since that time. They registered their relationship with NSW Births Deaths and Marriages on 2 August 2013.
16. They lodged their partner application on 23 July 2013.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

17. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse or de facto partner of the sponsoring partner, who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen and was identified in the related Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

18. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
19. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
20. *Financial*
21. The parties currently live in a property owned by the visa applicant. There is no mortgage on the property. They have lived there for about one year. The visa applicant is currently not working. He is renovating the house. He was last in paid employment about a year ago but he hopes to commence work as a driver with Uber in the near future. The sponsor is not employed and is in receipt of newstart payment. He is in process of switching to a student benefit as he is presently studying online. He receives around \$500 per fortnight from Centrelink. The parties are presently reliant on that income as it is the only money they receive. The sister of the sponsor assists them financially when she is able.
22. Statements for the numerous bank accounts in the visa applicant's and the sponsor's name were provided to the Tribunal for the period from July 2015 to August 2017. The statements show regular household expenditure in terms of food and other everyday costs were paid from various accounts. All accounts held either in individual names or in joint names were able to be accessed by them both. The Tribunal was concerned the patterns of expenditure and the cash amounts deposited into the accounts were not consistent with the stated incomes of the parties. When asked about where the amounts of money in excess of their stated income came from the parties told the Tribunal there were proceedings in another jurisdiction as to the source of the monies. While the Tribunal finds their evidence as to the extent and the source of their income to be not credible the Tribunal was satisfied their financial affairs were intertwined.
23. The Tribunal accepts from the evidence of the parties and the bank records provided that the parties pool their financial resources and share household expenditure. The Tribunal finds the financial aspects of the parties' relationship are consistent with their being in a genuine spousal relationship.
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26. *Nature of the household*

27. The Tribunal accepts the parties have lived together since they moved in together in March 2012. They first resided at Orange, then Port Macquarie, back to Orange and then Townsville, to Magnetic Island and back to Townsville.

28. The parties do not have any joint responsibility for the care and support of children. Presently neither party is working and they spend their days together.

29. The parties provided generally consistent evidence regarding the arrangements of their household. The parties share the household chores. The visa applicant does most of the cooking and the washing. The parties gave entirely consistent evidence about the events of the day before the hearing, including what they ate for dinner.

30. The evidence of the establishment of a joint household provides significant weight in support of the finding of a genuine and continuing relationship.

31. *Social aspects of the relationship.*

32. The parties provided a number of statutory declarations from family and friends which attested to the genuineness of the relationship. The information in these declarations is consistent with the other evidence before the Tribunal.

33. As noted above the Tribunal found the oral evidence provided by the parties to be clear and persuasive evidence that the parties have been in a loving and supportive couple relationship for over five years and that they provide one another with considerable support.

34. On the basis of the oral evidence of the parties and the evidence provided by way of photographs the Tribunal finds that the relationship between the visa applicant and his sponsor is recognised and supported by their family and friends. The Tribunal is satisfied that the parties represent themselves as being in a defacto relationship to their family, friends and the wider community.

35. *Nature of the persons' commitment to each other*

36. The Tribunal finds that Mr Cochrane and Mr Taylor were in a committed relationship at the time of application.

37. The Tribunal has carefully considered the evidence that the parties have been in a committed relationship and resided together on a continuous basis for over five years. There was no evidence contrary to that. Throughout that time the parties had faced significant personal difficulties but their support for each other had been constant. The applicant spoke of the support he had needed being in a country away from his family and not always being able to work in his chosen field. Similarly the sponsor spoke of his and his family having received unwavering support from the visa applicant during periods of great stress including when his mother died and in his current legal proceedings. The sponsor has mental health issues which impact on both parties and at times the relationship has been under great stress because of these factors. They both saw the support of the other person as being essential to their ongoing wellbeing.

38. The Tribunal has had the advantage of being able to observe the parties together at the hearing. The parties demonstrated a reasonable knowledge of one another's lives and

daily routines at the hearing. The parties gave consistent evidence about their future plans, including the sponsor getting his health back and their working and travelling together. Mr Cochrane and Mr Taylor presented as being committed to a long-term relationship. The Tribunal is satisfied that they draw companionship and emotional support from one another and that is consistent with their being in a long term relationship.

39. *Conclusion on spouse/de facto criteria*

40. The Tribunal is satisfied that Mr Cochrane and Mr Taylor have a mutual commitment to a shared life together to the exclusion of all others. The Tribunal is satisfied that the relationship between them is genuine and continuing. The Tribunal finds that they live together and that therefore they do not live separately and apart on a permanent basis. The parties are not related by family. The Tribunal finds that the requirements of s.5CB(2) are met at the time of the application and at the time of decision.

41. Mr Taylor has turned 18 years of age and therefore satisfies the criteria in cl.820.211(2)(c). At the time of application Mr Cochrane held a substantive visa and so the criteria in cl.820.211(2)(d) are not relevant.

42. The Tribunal further finds that at the time of this decision Mr Cochrane continues to be Mr Taylor's de facto partner, and continues to meet the requirements of cl.820.211(2).

43. Therefore, Mr Cochrane meets cl.820.211 and cl.820.221.

44. **Are the additional criteria for a de facto relationship met?**

45. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).

46. The Tribunal is satisfied that the parties had been in a de facto relationship for a period of at least 12 months before the application was lodged in 23 July 2013.

47. The Tribunal finds, having regard to the parties' passports, that both were at least 18 years of age at the relevant time.

48. For these reasons the Tribunal is satisfied that Mr Cochrane meets the additional criteria prescribed in r.2.03A.

49. **CONCLUSION**

50. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

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DECISION

56. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.211 of Schedule 2 to the Regulations.
- cl.801.221 of Schedule 2 to the Regulations.
- r.2.03A

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Moira Brophy
Member

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or
- (b) a Partner (Provisional) (Class UF) visa; or
- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
- (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.

- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).